

2001

State of Utah v. Lance Allan Pooler : Brief of Appellant

Utah Court of Appeals

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J Franklin Allred PC; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

Plaintiff/Appellee,

v.

LANCE ALLAN POOLER,

Defendant/Appellant.

:

: Priority No. 2 (in/carcerated)

: CASE NO. 20010623CA

:

OPENING BRIEF OF APPELLANT

This is an appeal from convictions of D.U.I., a third degree felony, of D.U.I., a class B misdemeanor, and of D.U.I, a class B misdemeanor, all in violation of Utah Code Ann. § 41-6-44, entered in the Third District Court of Tooele County, State of Utah, the Honorable David S. Young, Judge presiding.

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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JURISDICTION

Utah Code Ann. § 78-2a-3(2)(e) provides this Court's jurisdiction over this case involving a conviction of a third degree felony entered in a court of record.

ISSUE STANDARD OF REVIEW AND PRESERVATION

Did the trial court err in ruling that he had no jurisdiction to assess the validity of the convictions used to enhance Pooler's DUI conviction to a third degree felony?

This issue poses a question of law, to be reviewed without deference for correctness. Cf., e.g., Ryan v. Gold Cross Servs., Inc., 903 P.2d 423, 424 (Utah 1995).

This issue was preserved by pretrial motion to strike the prior convictions (R. 35-38), which was ruled on by the trial court (R. 54-55).

STATUTES AND COURT RULE

The following statute and constitutional provisions pertain and are copied in Addendum 2 to this brief: Utah Code Ann. § 41-6-44; Utah Code Ann. § 78-3-4, Utah Rule of Evidence 103, Utah Rule of Evidence 104.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

By way of amended information, the State of Utah charged Pooler with various traffic offenses which allegedly occurred on August 25, 2000, including DUI, which was enhanced to a third degree felony, on the basis of two prior convictions for DUI entered in 1997 and 1996 in justice courts in Sandy City and Summit County (R. 4B-6B).

Counsel for Pooler moved the trial court, the Honorable David S. Young, to strike the prior enhancements, or to find them constitutionally invalid, alleging that the prior convictions were obtained in violation of the United States and Utah Constitutions, Utah Rule of Criminal Procedure 11, with rule 9-301 of the Code of Judicial Administration, and/or in violation of the notice of enhancement requirements of Utah Code Ann. §41-6-44 (R. 35-38).

In support of this motion, counsel for Pooler detailed the records underlying the two pleas, indicating that the Sandy Justice Court records did not indicate that Pooler had been advised of his right to counsel or other constitutional rights, or of the enhancement value of his guilty plea, and that the Summit County Justice Court records indicated that the conviction entered when Pooler was tried in absentia, without notice of the date of trial, on a proffer of information, with the acquiescence of his defense attorney R. 35-38).

The State opposed the motion to strike, arguing that if Pooler wished to challenge the validity of the prior convictions, he should have done so by filing appeals or petitions for extraordinary relief under Utah Rule of Civil Procedure 65B (R. 42-43).

Counsel for Pooler filed a reply memorandum, arguing that he was entitled to move to dismiss the enhanced portion of the charge, and that the court should assess the validity of the prior convictions outside the jury's presence, because if the convictions were found to be improper and inadmissible, the jury's deliberations on the pending charges should not be tainted by consideration of the prior offenses (R. 48-50).

At the hearing on the motion to strike, the court acknowledged that the docket underlying one of the convictions appeared to indicate that Pooler pled guilty without counsel (R. 82 at page 11, 12).

The trial court denied the motion to strike (R. 47), and later signed an order providing, in relevant part,

Defendant's Motion to Strike the Prior Convictions of Defendant is hereby denied. This Court has no jurisdiction to hear testimony as to whether the defendant's 1996 and 1997 convictions for driving under the influence were constitutionally infirm and/or were taken in violation of Rule 11 of the Utah Rules of Criminal Procedure when such pleas were heard by other judges and the subsequent convictions were entered by other courts within the State of Utah.

(R. 54-55).

Pooler entered a conditional plea of guilty to third degree felony DUI, and to two class B misdemeanor DUIs, reserving the right to appeal from the trial court's ruling denying the motion to strike the prior convictions for enhancement purposes (R. 64, 68, 72).

Judge Young sentenced Pooler to a term of zero to five years at the Utah State Prison on the third degree felony DUI, and also ordered him to serve two concurrent terms

of six months for the misdemeanor DUIs (R. 74-75).

Pooler filed a timely notice of appeal (R. 76-77).

STATEMENT OF FACTS

Because this case was resolved by guilty pleas, there are no additional facts pertinent to the appeal.

SUMMARY OF ARGUMENT

The trial court erred as a matter of law in ruling that he had no jurisdiction to address the merits of the convictions enhancing the DUI to a third degree felony.

The law of the case doctrine does not forbid trial courts from revisiting prior convictions, particularly when the prosecution bears the burden of proof of the prior convictions in the context of enhancing charges in criminal trials.

This Court should reverse the trial court's denial of the motion to strike the enhancing convictions, and remand this case for withdrawal of Pooler's conditional guilty pleas, and for adjudication of the validity of the convictions alleged as enhancing offenses.

ARGUMENT

The jurisdiction of the district courts is exceedingly broad. See Utah Code Ann. § 78-3-4(1) (“The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.”), and just as those courts may revisit the validity of prior district court proceedings in the context of extraordinary writs, they may do so in the context of criminal prosecutions. See id.

While the law of the case doctrine generally counsels against co-equal courts overruling one another, this doctrine is not jurisdictional; trial courts have significant discretion to reconsider issues previously decided by other courts, and should do so to avoid injustice, or if the law or facts or procedural posture has changed. See e.g., State v. O’Neil, 848 P.2d 694, 697 and n.2 (Utah App.), cert. denied, 859 P.2d 585 (Utah 1993).

District courts routinely sit as appellate courts reviewing the final sentences of the justice courts, Utah Code Ann. § 78-3-4 (5), and the trial court surely erred in ruling that, as a jurisdictional matter, he could not address the adequacy of the proceedings in the justice courts. See id.

Trial courts have the obligation to adjudicate claims that prior convictions asserted for enhancement purposes are unconstitutional, in the course of holding the prosecution to its burden of proof in enhancement cases. See generally, e.g., State v. Triptow, 770 P.2d 146 (Utah 1989)(recognizing in the context of the habitual criminal statute that certified judgments constitute prima facie proof of the prior convictions, which may be challenged

by proof that the convictions were constitutionally infirm, i.e., entered without counsel or in an involuntary fashion). See also e.g., State v. Bradley, 535 So.2d 1108 (La. App. 1988)(reversing enhanced DUI conviction because enhancing conviction was obtained by plea, without adequate advisement of rights).

While properly authenticated documents may be *prima facie* evidence of prior convictions, depending on their content, defendants are entitled to challenge prior convictions, and otherwise put the prosecution to its burden of proof beyond a reasonable doubt of the enhancing offenses. Cf. State v. Bailey, 282 P.2d 339, 341 (Utah 1955)(where docket of the justice of the peace was admitted by stipulation, court found that facts stated therein were *prima facie* evidence of the prior conviction, which was presumed to be correct in the absence of contrary evidence). See also State v. Harris, 264 P.2d 284, 285-86 (Utah 1953)(discussing prosecution's burden to prove enhancing offenses beyond a reasonable doubt, and of defendant's right to challenge authenticity of prior offenses and whether they applied to him or someone else with similar name); State v. Branch, 743 P.2d 1187, 1192-93 (Utah 1987)(defendant may present evidence that pleas were involuntary to challenge presumption of regularity attaching to prior convictions admitted to obtain habitual criminal enhancement).

It has long been the law of Utah that prior DUI offenses which are used for enhancement purposes should be bifurcated from the trial of pending DUI charges to avoid prejudicing the defendant's trial on the pending charge. See, e.g., State v. Stewart, 171 P.2d

383, 386-87 (Utah 1946)(setting forth the bifurcation requirement, to safeguard the substantial rights of the accused to the presumption of innocence, to be tried on the pending charge absent the prejudice that would arise if the defendant were “advertised” to have committed a similar offense before).

Utah Rule of Evidence 103(2)(c) recognizes the advantage of having trial courts address the admissibility of evidence prior to jury trials, stating,

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Utah Rule of Evidence 104 further confirms the propriety of a trial judge assessing the propriety of evidence used to establish a prior conviction, stating,

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

....

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

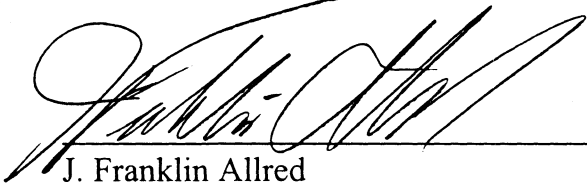
Whether in pretrial orders, or in ruling on a motion to dismiss for insufficient evidence in the course of a trial, trial courts certainly have the jurisdiction to assess the validity of prior convictions used to enhance criminal convictions. See, e.g., Triptow, *supra*.

CONCLUSION

This Court should reverse the trial court's denial of the motion to strike the enhancing convictions, and remand this case for withdrawal of Pooler's conditional guilty pleas, and for adjudication of the validity of the convictions alleged as enhancing offenses.

DATED this 3^d day of January, 2002.

Respectfully submitted:




J. Franklin Allred
Attorney for Mr. Pooler

CERTIFICATE OF MAILING

I hereby certify that on the 3^d day of January, 2002, I have caused to be deposited in the U. S. Mail, postage prepaid, two copies of the foregoing Opening Brief of Appellant addressed to:

J. Frederick Voros
Assistant Attorney General
Heber Wells Building
160 East Third South - Sixth Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Dated this 3^d day of January, 2002.



J. Franklin Allred
Attorney for Mr. Pooler

ADDENDUM 1

RULING OF THE TRIAL COURT

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3RD DISTRICT COURT-TOOELE

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THIRD DISTRICT COURT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

LANCE ALLAN POOLER,

Defendant.

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**ORDER DENYING MOTION
TO STRIKE PRIOR CONVICTIONS**

Case No. 001300022

On Monday, March 12, 2001, this matter came on for hearing on defendant's Motion to Strike the Prior Convictions of Defendant. J. Franklin Allred, Esq. appeared and argued on behalf of the defendant. David C. Cundick, Esq. appeared and argued on behalf of the State of Utah. The Court, having heard the arguments of counsel and for good cause appearing thereto now enters the following,

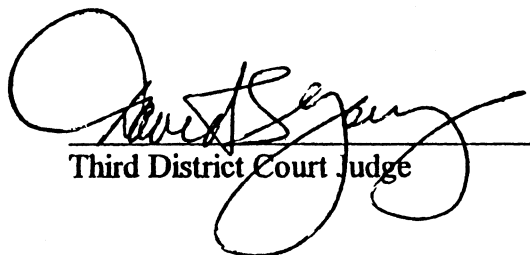
ORDER

Defendant's Motion to Strike the Prior Convictions of Defendant is hereby denied. This Court has no jurisdiction to hear testimony as to whether the defendant's 1996 and 1997

convictions for driving under the influence were constitutionally infirm and/or were taken in violation of Rule 11 of the Utah Rules of Criminal Procedure when such pleas were heard by other judges and the subsequent convictions were entered by other courts within the State of Utah.

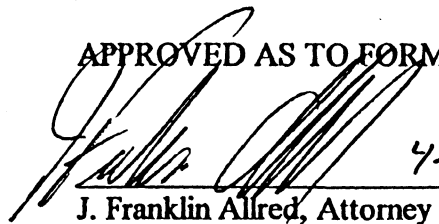
DATED this 2 day of April, 2001.

BY THE COURT:



Third District Court Judge

APPROVED AS TO FORM:

 4-02-01

J. Franklin Allred, Attorney for Defendant

ADDENDUM 2

PERTINENT STATUTES AND RULES

Utah Code Ann. § 41-6-44

(1) As used in this section:

(a) "educational series" means an educational series obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(b) "prior conviction" means any conviction for a violation of:

(i) this section;

(ii) alcohol-related reckless driving under Subsections (9) and (10);

(iii) local ordinances similar to this section or alcohol-related reckless driving adopted in compliance with Section 41-6-43;

(iv) automobile homicide under Section 76-5-207; or

(v) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(c) "screening and assessment" means a substance abuse addiction and dependency screening and assessment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(d) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;

(e) "substance abuse treatment" means treatment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(f) "substance abuse treatment program" means a state licensed substance abuse program;

(g) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(h) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has sufficient alcohol in his body that a chemical test given within two hours of the alleged operation or physical control shows that the person has a blood or breath alcohol concentration of .08 grams or greater; or

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) A person convicted the first or second time of a violation of Subsection (2) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;

(B) had a passenger under 16 years of age in the vehicle at the time of the offense; or

(C) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 24 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening and assessment;

(ii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (4)(d); and

(iii) impose a fine of not less than \$700.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) (i) Except as provided in Subsection (4)(e)(ii), the court may order probation for the person in accordance with Subsection (14).

(ii) If there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order probation for the person in accordance with Subsection (14).

(5) (a) If a person is convicted under Subsection (2) within ten years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 240 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening and assessment;

(ii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (5)(d); and

(iii) impose a fine of not less than \$800.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) The court shall order probation for the person in accordance with Subsection (14).

(6) (a) A conviction for a violation of Subsection (2) is a third degree felony if it is committed:

(i) within ten years of two or more prior convictions under this section; or

(ii) at any time after a conviction of:

(A) automobile homicide under Section 76-5-207 that is committed after July 1, 2001; or

(B) a felony violation under this section that is committed after July 1, 2001.

(b) Under Subsection (3)(b) or (6)(a), if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than \$1,500; and

(ii) a mandatory jail sentence of not less than 1,500 hours.

(c) For Subsection (6)(a) or (b), the court shall impose an order requiring the person to obtain a screening and assessment and substance abuse treatment at a substance abuse treatment program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment for not less than 240 hours.

(d) In addition to the penalties required under Subsection (6)(b), the court may require the person to participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(7) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(8) (a) (i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in a screening and assessment; and an educational series; obtain, in the discretion of the court, substance abuse treatment; obtain, mandatorily, substance abuse treatment; or do a combination of those things, apply to a conviction for a violation of Section 41-6-44.6 or 41-6-45 under Subsection (9).

(ii) The court shall render the same order regarding screening and assessment, an educational series, or substance abuse treatment in connection with a first, second, or subsequent conviction under Section 41-6-44.6 or 41-6-45 under Subsection (9), as the

court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b) If a person fails to complete all court ordered screening and assessment, educational series, and substance abuse treatment, or fails to pay all fines and fees, including fees for restitution and treatment costs, the court shall notify the Driver License Division of a failure to comply. Upon receiving the notification, the division shall suspend the person's driving privilege in accordance with Subsections 53-3-221(2) and (3).

(9) (a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this Subsection (9)(b) of the consequences of a violation of Section 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the Driver License Division of each conviction of Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

(10) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(11) (a) The Driver License Division shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) if the violation is committed within a period of ten years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The Driver License Division shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

(12) (a) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, one year, or two years to remove from the highways those persons who have shown they are safety hazards.

(b) If the court suspends or revokes the person's license under this Subsection (12)(b), the court shall prepare and send to the Driver License Division an order to suspend or revoke that person's driving privileges for a specified period of time.

(13) (a) If the court orders a person to participate in home confinement through the use of electronic monitoring, the electronic monitoring shall alert the appropriate corrections, probation monitoring agency, law enforcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which require:

(i) the person to wear an electronic monitoring device at all times;

(ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and

(iii) the person to pay the costs of the electronic monitoring.

(c) The court shall order the appropriate entity described in Subsection (13)(e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.

(d) The court may:

(i) require the person's electronic home monitoring device to include a substance abuse testing instrument;

(ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;

(iii) set specific time and location conditions that allow the person to attend school educational classes, or employment and to travel directly between those activities and the

person's home; and

(iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.

(e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.

(f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(c)(iv).

(14) (a) If supervised probation is ordered under Section 41-6-44.6 or Subsection (4)(e) or (5)(e):

(i) the court shall specify the period of the probation;

(ii) the person shall pay all of the costs of the probation; and

(iii) the court may order any other conditions of the probation.

(b) The court shall provide the probation described in this section by contract with a probation monitoring agency or a private probation provider.

(c) The probation provider described in Subsection (14)(b) shall monitor the person's compliance with all conditions of the person's sentence, conditions of probation, and court orders received under this article and shall notify the court of any failure to comply with or complete that sentence or those conditions or orders.

(d) (i) The court may waive all or part of the costs associated with probation if the person is determined to be indigent by the court.

(ii) The probation provider described in Subsection (14)(b) shall cover the costs of waivers by the court under Subsection (14)(d)(i).

(15) If a person is convicted of a violation of Subsection (2) and there is admissible evidence that the person had a blood alcohol level of .16 or higher, then if the court does not order:

(a) treatment as described under Subsection (4)(d), (5)(d), or (6)(b)(iii), then the court shall enter the reasons on the record; and

(b) the following penalties, the court shall enter the reasons on the record:

(i) the installation of an ignition interlock system as a condition of probation for the person in accordance with Section 41-6-44.7; or

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Subsection (13).

Utah Code Ann. §78-3-4

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) The district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.

(4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.

(5) The district court has appellate jurisdiction to adjudicate trials de novo of the judgments of the justice court and of the small claims department of the district court.

(6) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.

(7) The district court has jurisdiction to review:

(a) agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings; and

(b) municipal administrative proceedings in accordance with Section 10-3-703.7.

(8) Notwithstanding Subsection (1), the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only if:

(a) there is no justice court with territorial jurisdiction;

(b) the matter was properly filed in the circuit court prior to July 1, 1996;

(c) the offense occurred within the boundaries of the municipality in which the district courthouse is located and that municipality has not formed a justice court; or

(d) they are included in an indictment or information covering a single criminal episode alleging the commission of a felony or a class A misdemeanor.

Utah Rule of Evidence 103

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or

excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Utah Rule of Evidence 104

Rule 104. Preliminary questions.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

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